Vemco, Inc. *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, AFL–CIO. Cases 7–CA–32632, 7–CA–33311(2), and 7–CA–33839

September 21, 1994

DECISION AND ORDER

By Members Stephens, Devaney, and Cohen

On July 14, 1993, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Vemco, Inc., Grand Blanc, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

In adopting the judge's crediting employee Anna McMurtry's testimony that she was directed not to distribute copies of the November 13, 1991 Certification of Representative on company property on December 6, 1991, we have carefully reviewed the record, including the memorandum prepared by Human Resources Manager David Maxwell dated November 20, 1991, and find that the Respondent's evidence is insufficient to overcome the judge's credibility resolution in light of the other evidence supporting that finding, particularly McMurtry's consistent position that these events took place on December 6.

In adopting the judge's credibility findings with respect to employee Kimberly Lucas, we find it unnecessary to rely on his statement that her testimony reflected her gratitude to the Respondent for past favors and that she was ''in pari delicto'' with the individuals whom the Respondent discharged.

[2] In adopting the judge's finding that the April 20, 1992 walkout by employees was protected, concerted activity, we rely also on *Mike Yurosek & Son, Inc.*, 310 NLRB 831 (1993). Member Cohen finds it unnecessary to rely on that case and expresses no view concerning it.

In adopting the judge's finding that the complaint allegation that the Respondent unlawfully promulgated an overbroad no-distribution rule is not barred by Sec. 10(b), we find it unnecessary to pass on the judge's alternative finding that the allegation was sufficiently related to other charges filed against or then pending against the Respondent.

We find it unnecessary to pass on the judge's discussion of the circumstances in which a walkout is protected by Sec. 502 of the Act, since there is no claim that the walkout here is governed by that provision.

[3] We grant as unopposed the Respondent's motion to correct the transcript.

The Respondent has also requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Linda R. Hammell, Esq., for the General Counsel.
Peter J. Kok, Esq. and *Elizabeth M. McIntyre, Esq.*, of Grand Rapids, Michigan, for the Respondent.

DECISION

I. FINDINGS OF FACT

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case[1] came on for hearing before me at Flint, Michigan, on a consolidated unfair labor practice complaint,[2] issued by the

[1] The Respondent was before the Board in an earlier case in which it was charged with discharging a large number of employees for union activities and in failing to recognize a union which had obtained a card majority. The Board found violations in each of these particulars but, on enforcement, the United States Court of Appeals for the Sixth Circuit ruled that the employees in question were laid off for economic reasons. Since the Union's majority status was premised on authorization cards signed by these individuals, the court then held that the majority status finding was invalid since, as discharged employees, their cards could not be counted toward the Union's majority status. 304 NLRB 911 (1991), enfd. in part and rev. in part 989 F.2d 1468 (6th Cir. 1993). Since the violations of Sec. 8(a)(5) alleged in the instant case are predicated on a duty of the Respondent herein to bargain, and since the existence of that duty was dependent on the outcome of the earlier case, the General Counsel has moved to sever that portion of this case pending final disposition of the earlier case on appeal. The motion is granted. Another portion of the instant case, involving the discharge of Joan Girard in violation of Sec. 8(a)(3) of the Act, was dismissed by the General Counsel at the hearing because of an out-of-Board settlement.

[2] The principal docket entries in this case are as follows:

Charge filed by International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, AFL–CIO (Union) against the Respondent in Case 7–CA–32632, on December 2, 1991; complaint issued against the Respondent in said case by the Regional Director, Region 7, on January 16, 1992; Respondent's answer filed therein on January 30, 1992; charge filed by the Union against the Respondent by the Union in Case 7–CA–33311(2) on May 26, 1992, and amended on July 27, 1992; complaint issued against the Respondent in said case on July 29, 1992; Respondent's answer filed on August 11, 1992; charge filed by the Union against the Respondent in Case 7–CA–33839, on October 19, 1992; complaint issued against the Respondent in that case by the

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Regional Director of the Board's Region 7, which alleges that Respondent Vemco, Inc.[3] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the aspects of the consolidated complaint which were litigated in the hearing in this case alleged that the Respondent instituted an overly broad no-solicitation rule and that it disciplined three employees and discharged Beatrice Ellis and Gail Holland Cook because they had engaged in concerted, protected activities, namely, walking out of the plant to protest working conditions. The Respondent denies the promulgation of an overly broad no-solicitation rule, contends that the allegation relating to the rule is barred by limitations, and insists that individuals it disciplined and discharged were not engaged in concerted protected activities when they walked out of the Respondent's plant on the morning of April 20, 1992. On these contentions, the issues herein were drawn.[4]

B. *The Unfair Labor Practices Alleged*[5]

1. Background

Since 1988, the Respondent has operated a plant in Grand Blanc, Michigan, in which it now employs between 300 and 350 employees. The Respondent supplies, among other things, fascias and cladding to various automobile manufacturers. Fascias are plastic bumpers. Cladding is a plastic ground-effects package used on the lower 13 inches of an automobile to create a decorator look. The Respondent also manufactures bezels and fillers, which are plastic items placed around headlights and license plate holders on Cadillacs.

The initial Board litigation involving this Respondent (*Vemco I*) dealt with a Board election conducted among the Respondent's production and maintenance employees on September 22, 1989. The Union narrowly lost this election when the tally excluded some 56 challenged ballots. Objections to its conduct were filed by the Union. The Union also sought to achieve majority status on the basis of authorization cards it had obtained earlier in 1989. As noted previously, the U.S. Court of Appeals denied enforcement of a portion of the Board's Order requiring the Respondent to bargain on the basis of the authorization cards. In the Board litigation, the objections to the election were sustained, the challenged ballots were counted resulting in a Union victory, and a certification was issued on December 13, 1991. However, this certification was premised on the eligibility of ostensibly prounion voters who ultimately were found by the court to be ineligible because they had been lawfully discharged before the election, so the certification was necessarily invalidated. However, because of time factors involved, a rerun election had not been conducted and final disposition of the representation case was necessarily in abeyance at the time of the hearing in this case.[6]

While rejecting the Board's finding that the Respondent herein violated Section 8(a)(3) of the Act by discharging 56 employees in a mass layoff, the court upheld the Board's finding that the Respondent had violated Section 8(a)(1) of the Act in several particulars:

1. Threat to close the plant for noneconomic reasons in the face of an organizing campaign and to reopen it later with new employees.
2. Threat of harsher personnel decisions prompted by union considerations.
3. A promise of benefit relating to the institution of recall rights and advance notice of assigning overtime on weekends.
4. The confiscation of union literature.
5. An overly broad no-solicitation rule and threats of discriminatory discharge involving employee Hall.

The court also expressed the opinion that these violations of the Act would be sufficient to warrant the running of a second election. Said violations necessarily constitute part of the background against which the events in this case were played out and evidence an on-going labor dispute which existed when the events of April 20 took place.

2. The no-solicitation rule

On November 13, 1991, the Regional Director for Region 7 issued a Certification of Representative establishing that the Charging Party was the duly selected bargaining representative of all the Respondent's production and maintenance employees who were employed at its Grand Blanc facility. The Certification of Representative was premised on the results of the September 22, 1989 election. Two days later, the Charging Party wrote the Respondent a letter in which it demanded to bargain. Within the next 3 weeks—on a date very much in dispute[7]—a prounion activist, Anna McMurtry, employed in the Respondent's assembly department, obtained about 40 copies of the Certification of Representative from the UAW and passed out some of them at the plant. At the time in question, McMurtry was assigned to the first shift which began work at 7 a.m. She handed out these copies of the Board's certification in the locker area, a place where employees are given lockers in which they store their personal items. She placed the remainder of the papers on a table in the breakroom. In this area, employees eat their lunches, take their breaks, and use vending ma-

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Regional Director, Region 7, on November 20, 1992, and order consolidating cases issued by the Regional Director, Region 7, on November 24, 1992; Respondent's answer to complaint in Case 7–CA–33839 filed on December 3, 1992; hearing held in Flint, Michigan, before me on April 13–15, 1993; briefs filed with me by the General Counsel and the Respondent on or before July 1, 1993.

[3] Respondent admits and I find that it is a corporation maintaining an office and place of business in Grand Blanc, Michigan, where it is engaged in the manufacture and the nonretail sale and distribution of plastic injected molded parts and related products for the automobile industry. In the course and conduct of this business, it annually purchases and receives at its Grand Blanc, Michigan facility directly from points and places outside the State of Michigan goods valued in excess of $50,000. Accordingly, it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] Certain errors in the transcript have been noted and corrected.

[5] Respondent's posttrial motion that I recuse myself is denied.

[6] In a response to the Board's motion for a hearing before the Sixth Circuit en banc, the court asked the Respondent for a statement of position concerning the proper disposition of the pending representation proceeding. The record in this case does not reflect its response.

[7] McMurtry is adamant that the events in question occurred on December 6, 1991, as alleged in the charge which was filed on May 26, 1992. The Respondent insists that these events occurred on November 20, 1991, just 6 days beyond the 10(b) period when measured by the charge filed in Case 7–CA–33311(2).

chines, refrigerators, and microwaves which are placed there by the Respondent for employee convenience.

Later in the morning, she was summoned to the office of David Maxwell, the Respondent's human resources manager. Maxwell told McMurtry that a witness reported to him that she was handing out certification documents in the plant. Murtry denied that she had been doing so. (She admitted in her testimony that she had lied in making this denial and had done so because she was in fear.) Maxwell repeated the question, telling her to ''take heed'' if she did. I credit her testimony to the effect that he went on to say that she could hand the fliers out at Landon's (a bar) on Holly Road (a public thoroughfare) or at home but not on company property. Shortly thereafter, the conversation ended and she returned to her duties.[8]

3. The events of April 20, 1992, the reprimands of Kimberly Lucas, Brian Cassidy, and Vanessa Walker, and the discharges of Beatrice Ellis and Gail Holland Cook

Not long before the events here in issue, the Respondent instituted at its plant a management style described as synchronous production. According to the components of this program, groups of workers within the plant, sometimes referred to as cells, were empowered and were responsible for making certain production decisions and achieving certain production results. In the cell for the fascia rework area, where all the discriminatees in this case were employed, workers had to sign off on vacation requests submitted by fellow employees in order to guarantee there would be enough employees present during all shifts to operate the fascia rework line. In effect, every employee had veto power over another employee's vacation. Employees were, within stringent limits, empowered to make group decisions adjusting shift starting times and other matters. Despite a conflict in the testimony, arising largely out of a desire on the part of some witnesses to escape responsibility for their own acts and conduct, I find that the fascia rework cell, as with other cells, elected a spokesperson whose job it was—and is—to inform management personnel of group decisions. At the time in question, employee Fran Metzger was the elected spokesperson while discriminatee and Respondent witness Kimberly Lucas, a former supervisor, was designated to fill in for Metzger during her absences. During the week of April 20, 1992, Metzger was on vacation.

The fascia rework assembly line is located in building 3-A, abutting the main assembly building, designated as building 3. The two rooms are connected by two doors. The rework assembly line is approximately 40 feet long, nearly oval in shape, and moves through an opening into an adjacent room as it revolves. It takes at least eight individuals to man this line and more are preferred. Fascias—the front bumpers of automobiles—are affixed to the line and held in place by blocks as they move. Employees along the line sand each fascia as it passes in order to remove blemishes. At the end of the line, each fascia is inspected and then removed and taken to the assembly line located in the adjacent building. The movement of the line is activated by a button on the wall which is pressed to start it in motion.

On Thursday, April 16, the cell of the fascia rework area was told that it had 8 hours of work to perform the following Monday. Cell members voted to come to work at 5 a.m. so that they could leave early in the afternoon. There is some dispute whether their foreman was supposed to be informed of this decision. There is no dispute that those who reported to work at 5 a.m. and continued to work without leaving the plant were paid for their time beginning at 5 a.m. However, no supervisors arrived until 6 a.m.

Good Friday, April 17, was a scheduled holiday and no portion of the plant worked.[9] The Respondent took advantage of the long Easter weekend to bring in a contractor to scrub, shot blast, strip, clear coat, and paint the entire plant, except for the fascia rework area, which had been painted 2 weeks earlier. In order to clear the adjacent assembly area, racks, boxes, and tables were removed to the fascia rework area, where they were stacked on top of each other. Since the rest of the plant, including areas through which fascia rework employees had to walk in order to get to their worksite, had been stripped and painted, sliding doors throughout the plant had been left open and fans were operating at the corners of these rooms in order to blow fumes to the center of the rooms so they could be removed from the building by a fan attached to an overhead vent.

Fascia rework employees were the only employees in the plant who were scheduled to work on Monday, April 20. When they arrived at the plant at 5 a.m. and went to their worksite, they found that it was next to impossible to reach the conveyor and impossible to operate it because racks and boxes were stacked on top of each other which not only impeded their entry but also made it impossible for the conveyor to move. The fascia rework area hi-lo—a forklift used to move racks, facias, and boxes to and from the conveyor—was crammed among the items which had been piled in the fascia rework area and could not be reached. It was also impossible to reach the button on the wall which activated the conveyor.

Almost all the employees in the fascia rework cell who were scheduled to work on April 20 arrived at the plant on time. This number included four temporary employees who had been hired from an outside labor contractor. In light of the fact that it was impossible to start the conveyor and to rework the fascias which were scheduled for production that morning, they held a meeting among themselves to decide what to do. Despite her protestations to the contrary, I find that Kim Lucas[10] led the discussion and was effectively in charge of what occurred.

[8] Maxwell's note of this meeting, while corroborating his testimony as to the date, tends to support McMurtry's assertion that Maxwell gave her a verbal order containing a blanket prohibition against distributing the Board's certification anywhere in the plant.

[9] Maxwell testified that, for holiday pay purposes, Easter Sunday was designated a holiday. However, the Respondent's personnel handbook makes no mention of Easter Sunday. It designates Good Friday as a company holiday. To qualify for holiday pay, an employee is required to work both the day before and the day after a scheduled holiday, unless he is excused.

[10] Lucas was part and parcel of the walkout which ensued. She appeared at the hearing as a witness for the Respondent, despite the fact that she was a discriminatee who had been formally reprimanded. Her rambling, exculpatory testimony was an unconvincing recital of the events in question. It obviously reflected her gratitude to the Company for not discharging her while discharging others who were in pari delicto, as well as gratitude for other favors be-

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I credit testimony to the effect that Lucas said to her fellow employees on this occasion that it was impossible to work, that the area was unsafe, and that employees should all go home. She invited other employees to express their opinion. She was not alone in her evaluation of the situation. I credit Cook's testimony that everyone agreed with Lucas except for employees who operated the hi-lo's, namely, George Ballard, Jason Murer, and Matt Griswald. During the course of the ensuing discussion, which took 20 to 30 minutes, Ellis pulled out an employee handbook and began to consult the section on safety. One employee, Jason Murer, suggested that they phone a supervisor, but Lucas replied that she did not have the phone number of any supervisors. Gary Ballard said that it would be at least an hour before the fascia rework area could be cleared out. His wife, Colleen Ballard, a witness summoned by the Respondent, testified that Ellis complained that the area was unsafe and that some of the temporary employees complained about the smell. Some employees, especially Lucas, were afraid that they might get into trouble if they merely stood around and did nothing while being on the clock.[11]

Mrs. Lucas obtained a sheet of lined paper which Ellis tore out of a spiral notebook she carried with her. Lucas passed it around and suggested that each employee present sign it. Most did but a few did not. Murer complained in his testimony that the leaders of the walkout movement were ''trying to use others to put peer pressure on me to leave.'' A sharp and nasty conflict in testimony arose concerning this document. General Counsel witnesses testifed that General Counsel's Exhibit 9, now in evidence and containing the signatures of 12 employees, was not the document which they signed early in the morning of April 20. According to them, Lucas wrote on the top of the paper which was circulated a statement to the effect that employees were leaving because their area was unsafe. The paper, after being completed, was then given to Colleen Ballard, who took it to the human relations department and slipped it under the door because there was no one present in the office to receive it in the early morning hours. Reportedly, she then returned to where the other employees were standing around and told them that this is what she had done. General Counsel's witnesses insist that General Counsel's Exhibit 9, which was obtained by subpoena from the files of the Respondent, was an attendance sheet which had been prepared for another earlier meeting.

Respondent's witnesses identified General Counsel's Exhibit 9 as the paper which was signed on the morning in question. Twelve employees signed it and three then took a black marker and obliterated their names. Two testified that Lucas presented it to them for signature. According to them, Colleen Ballard simply wrote the date on top of the paper, along with numbers along the left-hand margin to designate places for signatures, but made no other notation. She assertedly took the paper after it was completed and laid it on a table but has no idea of what became of it thereafter. Respondent's witnesses referred to it as an attendance list which the departing employees (and others) signed before the employees left the plant. It is not necessary to resolve this conflict relating to the nature and identity of the list in order to resolve the issues in this case and I do not.

At about 5:45 a.m., nine employees, includlng four temporary employees, walked out of the plant together. The regular employees who left were Cassidy, Lucas, Cook, Ellis, and Vanessa Walker. Cassidy went home, Cook went to a friend's house, and the others, along with temporary employee Chris Walker, drove in their respective cars to Venus Coney Island Restaurant, a nearby eating establishment, and had breakfast. On their way out, they stopped at the guard shack and signed a second list evidencing the fact that they had been at work. The guard who manned this post was temporarily absent and had left a note taped to the window or door of the shack saying that he would be back shortly. I credit corroborated testimony to the effect that they all stopped at the guard shack while Mrs. Lucas signed her name and the time on the paper taped to the shack, while others affixed their signatures below hers. (In Cook's words, ''We left the note to cover our butt.'') The paper in question was not produced in response to the General Counsel's subpoena and is not in evidence. The Respondent asserts that it never received such a document.

At the restaurant, Lucas received a phone call from employee Lydia Buczynski.[12] Buczynski, who had originally planned to join the walkout, informed Lucas that she had been warned about leaving by her supervisor, Scott Parker, and was not going to join them at the restaurant. After finishing their meals, the regular employees who were at the restaurant returned to the plant. An effort was made to reach Cook but it was unsuccessful and she remained away from the plant for the rest of the day, as did Cassidy. On returning to the plants, Lucas and Ellis found that the hi-lo drivers were in the process of removing the boxes, racks, and other impediments surrounding the fascia rework line. Two hi-los were required to remove an additional assembly line, which had been stored in the fascia rework area, and to return it to the regular assembly area. Two of the employees who had remained in the plant were temporarily assigned by a supervisor, Laurie Vukelich, to sand bezels and fillers. When the fascia rework area was cleared and enough employees were on hand to operate the rework conveyor,[13] the operation began and continued throughout an 8-hour shift. Instead of leaving the plant at 1 p.m. as originally scheduled, the fascia rework group worked until 2 p.m. or shortly thereafter.

On the following day, the entire plant was once again in full production. Cook and Cassidy returned to work at their regular starting hour. Either on Monday or on Tuesday, Maxwell called Walker, Lucas, and Cassidy into his office and, in separate interviews, asked them what had happened. They explained the condition of their work area when they arrived the previous morning but, according to Respondent's wit-

stowed on her during her tenure with the Respondent. She sounded like she was testifying from a trial brief rather than from her own recollection of events as they transpired, so I discredit her testimony insofar as it conflicts with any other evidence in the record.

[11] Actually, the Respondent did not maintain conventional timeclocks. Each employee recorded his or her own time and entered the number of hours worked each day on an attendance sheet kept by the supervisor in the fascia rework area.

[12] Buczynski's name was repeatedly misspelled in the record as ''Brzezinski.''

[13] None of the four temporary employees who walked out of the plant on April 20 ever returned. The firm for which they worked was instructed by the Respondent not to send them back to the Respondent's plant.

nesses, confessed error about walking out of the plant. Each was given a reprimand which read:

> *X* Written warning
>
> Reason for record: Used poor judgment in leaving the plant without authorization. If this happens again, disciplinary action will be taken up to and including discharge.

During the morning of April 21, Cook was called into Maxwell's office for a disciplinary interview. Parker was present on this occasion. The Respondent admits that it had already decided to discharge her. The reason given for discharging both Cook and Ellis, while three others who participated in the walkout were merely given written warnings, was that both Cook and Ellis had been given warnings 2 weeks before for leaving the plant without authorization. (The reference here was to an incident in which Ellis, who suffers from asthma, became ill at the plant and was driven to a hospital by Cook.) During her final interview, Maxwell asked Cook what had happened on April 20. She replied that the fascia rework area was a mess, that employees were unable to work, and that everyone thought it was unsafe. She also complained about the fumes given off by the paint and by the cleaning fluid which had been used to strip the floors. She told Maxwell that they had left two notes in hopes that this action would excuse their leaving. She mentioned one note which was assertedly placed under the door in the human resources office and another which had been taped to the door of the guard shack. Maxwell informed Cook that she was being discharged because she had been written up just 2 weeks before for leaving the plant without authorization. Cook objected, saying that she did not think it was fair because, under the Company's progressive discipline system, a 3-day layoff would normally be the penalty for a second offense. Maxwell disagreed, simply replying that management thought that discharge was appropriate. A termination slip which had already been prepared was tendered to her for signature. She refused to sign and was then escorted out of the plant by Parker.

Shortly thereafter, Ellis was summoned to Maxwell's office and was also discharged. During her final interview, Maxwell asked Ellis where she had gone the previous day and who had gone with her. She replied that she had gone to the Venus Coney Island Restaurant with Kim (Lucas), Vanessa (Walker), and Chris (Walker). He asked why she had gone and was told by Ellis that she did not think that conditions around the fascia rework area were safe. She explained that the racks and boxes in the area made it unsafe, mentioned that it was Kim's idea to leave, and told him that Kim had left a note which she thought was in the human resources office. Maxwell asked Human Resources Manager Kenny Brewer, who was present, if he had received such a note. Brewer replied that he had not. Ellis also stated that another note had been left at the guard shack. Maxwell pointed out to her that she had been disciplined 2 weeks earlier for leaving the plant without authorization and then informed her that she was fired. As in the case of Cook, he tendered her a prepared termination slip and asked for her signature. She refused to sign and said that she was going to appeal her discharge to higher authority at the plant because she did not think it was fair. At this point, she left the office and was escorted from the plant.

C. *Analysis and Conclusions*

1. The overly broad no-distribution rule

The Respondent's personnel handbook contains a no-solicitation, no-distribution rule which has sufficient exceptions to allow it to pass muster under the Act, and no challenge to those rules, as written, has been leveled in this case. However, the existence of a valid, written rule does not preclude a finding of an invalid and illegal restriction which may have been superimposed by a particular supervisor upon a particular employee or group of employees. In *Vemco I*, the Respondent was found guilty of violating Section 8(a)(1) of the Act by virtue of a statement made by a supervisor to a group of her employees that she was tired of hearing about unions and that, ''if these rumors don't stop,'' verbal warnings to employees would be issued. The Board concluded that this statement amounted to a flat, unqualified prohibition against talking about unions at any time in the plant in violation of the Act. Its conclusion was upheld by the Sixth Circuit on appeal without comment.

In this case, I have found as a fact that Maxwell told McMurtry that she could hand out union literature at a nearby bar, on a public thoroughfare, or at her home but she could not do so at the plant. Such a prohibition is overly broad, in that it forbids even the distribution of such literature in nonworking areas on the employee's own time. I also credit her testimony that the interview during which this remark was made took place on December 6 within the 10(b) period, as defined by the charge in Case 7–CA–33311(2). However, even if this were not true, a remark of the kind and character as the one made by Maxwell could still be reached by the Board's processes if it had been made on November 20. The Respondent contends that the Board is precluded from prosecuting such a statement because an unfair labor practice charge specifically addressed to that alleged violation was not filed until 6 months after the statute of limitations had run. However, there are other unfair labor practice charges outstanding against the Respondent which do not suffer from this alleged infirmity.

Assuming arguendo that Maxwell's offending remark was made on November 20, it should be noted that one of the three charges which were part of this case, as originally consolidated, was filed on December 2, within 2 weeks after the interview as recited in Maxwell's account of the events. While this charge was addressed to violations of Section 8(a)(1) and (5) of the Act, it dealt with the same course of conduct as the events particularized in the Complaint relating to Maxwell's statement. Moreover, there was also outstanding on November 20, 1991, other charges in *Vemco I* which specifically addressed the question of overly broad no-solicitation and no-distribution rules. Indeed, one such charge had matured into a Board order which was then undergoing court review. The Supreme Court held in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1960), that once a charge has been filed, the Board is not limited to prosecuting only those violations which have occurred before the filing date but may, on the strength of the charge, issue a complaint addressed to unfair practices occurring subsequent to the filing date. The charges in Case 7–CA–32632 and those filed in *Vemco I* are surely

broad enough and timely enough to bring within their ambit the statment which Maxwell made to McMurtry, regardless of when it was made. Accordingly, I find that, by imposing on McMurtry an overly broad no-distribution rule, the Respondent herein violated Section 8(a)(1) of the Act.

2. The discipline and discharges arising out of the April 20 walkout

It is axiomatic that the Act authorizes employees to engage in concerted, protected activities and shields those employees from either discipline or discharge arising out of those activities. In ascertaining whether the walkout of April 20 is entitled to such treatment, an inquiry must be made as to whether they were both ''concerted'' and ''protected.''

It is undisputed on this record that nine individuals, five of them directly employed by the Respondent, walked out of the plant early in the morning of April 20 after first discussing at some length what course of action they should take when confronted by the disarray at their worksite. They left together and went their separate ways only after leaving the plant. Maxwell admitted in his testimony that the disciplined employees had taken group action, as indeed the facts of the situation would require him to do. The only other remaining question is whether their group action was protected.

Respondent's counsel admits that the condition of the fascia rework area early in the morning of April 20 was something other than what it ought to be. A contractor who had been in the plant throughout the Easter weekend had relocated a conveyor and a room full of boxes and racks in order to strip and paint the adjacent assembly area. In so doing, he put some of this material in a nearby warehouse and stacked the rest in such a manner that it was literally impossible for fascia rework employees to do their assigned job when they arrived at the plant. Because of the experiment in industrial democracy in which this Respondent was then engaged, there were no supervisors around to give them an alternative assignment so they were left to their own devices. Some, although not all, of those present decided to walk out. In the view of the Respondent, they had a more responsible choice before them which they should have made. Granted that they could not have started the fascia rework assembly line and that the line could not have moved, even if someone could have reached the button which starts the line in motion, in the Respondent's view the employees could have busied themselves with other chores, such as cleaning out the latrines, polishing up the tables in the breakroom, or sanding bezels and fillers. Five of them did not exercise the choice to stay and work and so they were punished. This argument is but another way of saying that their response to the unsupervised situation at hand was not a reasonable response so the Respondent was justified in reacting as it did.

As the Supreme Court pointed out long ago in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 at 16 (1962), ''it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination whether a labor dispute exists or not.'' Employees who go on strike always have an alternative to striking. If they are expected, under the law, always to exercise their alternative option, there would never be a strike. This is not what the Act requires. The situtation presented in this case should not be confused with cases arising under Section 502 of the Labor Management Relations Act, which permits ''the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment.'' Such cases, which call on the Board to determine whether working conditions prompting a walkout were merely ''dangerous'' or whether they present an ''abnormally dangerous'' situation normally arise where employees, who are represented by a union and who are covered by a collective-bargaining agreement containing a no-strike clause, are faced with a serious emergency situation which requires an immediate and drastic response. In such instances, abnormally dangerous conditions, as defined in the Act and interpreted by the Board, may justify a walkout which, under other circumstances, might well violate a no-strike clause in a contract and leave concerted activity unprotected. See *Combustion Engineering*, 224 NLRB 542 (1976). There is no such contract or no-strike clause in this case. Indeed, to invoke the protection of Section 7 of the Act, it is not necessary that the protested working condition even be regarded as dangerous. A protest aimed at chaotic working conditions, even if not dangerous, is protected activity since such a walkout has ''a reasonable relationship to the employees' legitimate interest in their working conditions.'' *Blue Star Knitting*, 216 NLRB 312 at 316 (1975); *Ontario Knife Co.*, 247 NLRB 1289 (1980); *Marlene Industries Corp*., 255 NLRB 1446 at 1462 (1981).

The situation in which the discriminatees found themselves on the morning of April 20 closely approximates the situation addressed in *Washington Aluminum*, supra at 13 and 14, in which the Supreme Court stated:

> In denying enforcement of this order, the majority of the Court of Appeals [for the Fourth Circuit] took the position that because the workers simply ''summarily left their place of employment'' without affording the company an ''opportunity to avoid the work stoppage by granting a concession to a demand,'' their walkout did not amount to a concerted activity protected by § 7 of the Act. On this basis, they held that there was no justification for the conduct of the workers in violating the established rules of the plant by leaving their jobs without permission and that the Board had therefore exceeded its power in issuing the order involved here because § 10(c) declares that the Board shall not require reinstatement or back pay for an employee whom an employer has suspended or discharged ''for cause.''
>
> We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the niggardly fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation would effectively nullify the right to engage in concerted activities which that section protects.

Before concerted activities become protected, it is not necessary that all employees in a plant, a bargaining unit, or a group join in those activities. The fact that there may be dissent does not destroy the rights of those who decide to take concerted action. *Jasper Seating Co*., 285 NLRB 550 (1987), enfd. 857 F.2d 419 (7th Cir. 1988). Concerted activities do not become unprotected because employees who decide to strike have failed to submit themselves to a noncontractual company-imposed grievance resolution or ''open-door'' procedure. *Advance Industries*, 220 NLRB 431 (1975), rev. in part 540 F.2d 878 (7th Cir. 1976). To avoid discipline or discharge for engaging in concerted, protected activities, it is not necessary that the employer know that the employee activities prompting its discipline or discharge were either concerted or protected. *Scioto Coca-Cola Bottling Co*., 251 NLRB 766 (1980). Ignorance of the concerted, protected nature of a job action will not shield an employer from a finding of an unfair labor practice, nor is there any requirement that protesters give their employer a specific demand as to the nature of their grievance. *Eaton Warehousing Co*., 297 NLRB 958 (1990). All that Section 7 requires is that the job action in question be taken by agreement of the affected employees, however spontaneous and casual that agreement might be, and that the action be prompted by a work-related problem. *Vic Tanny International*, 232 NLRB 353 (1977), enfd. 622 F.2d 237 (6th Cir. 1980). Ignorance or mistake will not shield an employer from a finding of an unfair labor practice, even where there is a good faith but incorrect belief that employees had engaged in misconduct during the commission of protected activities. *Shell Oil Co*., 226 NLRB 1193 (1976).

If there is some objective basis for a claim by striking employees that there was a safety hazard at the plant which prompted their strike, this is sufficient to provide protection for such activity under Section 7 of the Act. In this case, there is little doubt that access to the employees' regular work station was blocked by boxes, racks, and other impediments which had been stacked there by a painting contractor. At least three employees, if one includes Lucas, vocally stated at the time or on the witness stand that the area was unsafe. Cook said one would have to snake his or her way through boxes and racks to reach the assembly area. Ellis, who is 4 feet 11 inches tall, felt that the piling of boxes 15–20 feet high posed a safety problem. Others might disagree with their assessment of the situation but all that such disagreement does is place in issue the reasonableness of their fears, a question which the *Washington Aluminum* doctrine precludes the Board from resolving. Moreover, even if the situtation which confronted these employees on April 20 was merely inconvenient and not hazardous, the inconvenience of their access to the assembly area would be a sufficient basis for determining that a labor dispute, within the meaning of Section 2(9), had arisen and that the walkout which ensued was protected.

With regard to the noxious fumes which Ellis complained about, there is no question but that, during the preceeding 48 hours, various areas of the plant had been stripped and painted. Doors had been left open, floor fans had been placed in corners of rooms which had been painted, and fans were blowing fumes to the center where they could be removed by overhead fans next to a vent. Whether the fumes which the Respondent was obviously trying to remove from the plant were noxious or trivial is basically a question of opinion. Just as beauty is in the eye of the beholder, so the debilitating character of paint and cleaning fumes is subjective in character. To Ellis, who suffers from asthma and who had been taken to the hospital 2 weeks before because of illness occasioned by noxious odors in the plant, the condition of the air in the plant was physically threatening. To other employees it may have been of little or no consequence, but here again such a dispute draws into question the reasonableness of the walkout and places the question beyond the purview of the Board.

The last string in the Respondent's bow is that the walkout in question did not arise over a sincere grievance and was not really prompted by concerns over safety or air pollution but stemmed from the unhappiness on the part of several fascia rework employees over the fact that they had been called in to work on Easter Monday while the balance of the plant was enjoying the benefit of a long weekend. Such a contention, even if factually founded,[14] would not benefit the Respondent. The Board does not inquire into a protester's sincerity and must limit its examination to determine whether there is any rational foundation for the protest. However, even such an inquiry in this case would not change the results. A strike to protest the refusal of an employer to grant a holiday is as much a labor dispute under Section 2(9) of the Act as is a strike over plant safety or air pollution issues. It is equally entitled to the protection of Section 7 of the Act. However, I do not believe that the grievance which was asserted to justify the walkout of April 20 was pretextual. Accordingly, I find that, by writing up Kimberly Lucas, Brian Cassidy, and Vanessa Walker and by discharging Beatrice Ellis, Gail Holland Cook, and the four temporary employees because they had engaged in concerted, protected activities, the Respondent herein violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Vemco, Inc. is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By verbally imposing upon employees an overly broad no-distribution rule; by issuing written reprimands to Kimberly Lucas, Brian Cassidy, and Vanessa Walker; and by discharging Beatrice Ellis, Gail Holland Cook, and the four temporary employees because they engaged in concerted, protected activities, the Respondent violated Section 8(a)(1) of the Act. The aforesaid unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[14] In advancing this contention, the Respondent makes much of the fact that four of the strikers went to breakfast together after they left the plant. Two others did not. The fact that, after leaving the plant, strikers ate breakfast, went home, or visited friends is of no consequence. Having left the plant, they had to go somewhere. Their right to take the action they did depends upon facts and circumstances which existed before they left the plant and had committed the alleged violation of company rules for which they were disciplined.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act found herein and in *Vemco I* are repeated and pervasive and evidence on the part of this Respondent an attitude of total disregard for its statutory obligations and the rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). The recommended order will also provide that the Respondent be required to offer full and immediate reinstatement to Beatrice Ellis and to Gail Holland Cook to their former or substantially equivalent employment, and that it make them and other discriminatees whole[15] for any loss of earnings which they have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[16] with interest thereon computed at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also require the Respondent to expunge from the personnel files of these employees any unlawful disciplinary actions which are recited therein and will further require the Respondent to notify those employees whose files are being expunged that such actions have taken place and that the infractions formerly noted will not be used as the basis for future discipline. It will further require the Respondent to notify the labor contractor who provided the services of the temporary employees who were discharged that it has no objection to their employment at the plant. I will also recommend that the Respondent be required to post the usual notice advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Vemco, Inc., its officers, agents, supervisors, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or enforcing a no-distribution rule which forbids employees from distributing literature in nonworking areas on nonworking time.

(b) Discharging or disciplining employees because they have engaged in concerted, protected activities.

(c) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Beatrice Ellis and to Gail Holland Cook full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them and other unlawfully disciplined employees whole for any loss of pay or benefits suffered by them by reason of the unfair labor practices found herein, in the manner described above in the remedy section, and make whole the temporary employees who were removed from its plant for any loss of pay or benefits suffered by them by reason of the unfair labor practices found herein, with interest.

(b) Remove from its files any reference to unlawful discharges or unlawful discipline and notify employees in writing that this has been done and that the discharges or discipline will not be used against them in any way.

(c) Notify the labor contractor who supplied the services of the four temporary employees who were removed from its plant that the Respondent has no objection to their referral for work at its plant.

(d) Preserve and, on request, make available to the Board and its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Post at the Respondent's Grand Blanc, Michigan, plant copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] Some employees who were disciplined but not discharged were denied holiday pay, even though they had worked a full shift on April 20, because they had engaged in the protected walkout. They are entitled to this compensation, nominal though it may be.

[15] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Vemco, Inc. is posting this notice to comply with an Order of the National Labor Relations Board, which was issued after a hearing in this case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT impose or enforce a no-distribution rule which prohibits employees from distributing literature in nonworking areas in nonworking time.

WE WILL NOT discipline or discharge employees because they have engaged in concerted, protected activities.

WE WILL NOT by any other means or in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer to Beatrice Ellis and to Gail Holland Cook full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and WE WILL make them and other employees who were unlawfully disciplined whole for any loss of pay or benefits suffered by them by reason of the unfair labor practices found in this case, with interest, and WE WILL make whole the temporary employees who were removed from the plant by reason of the unfair labor practices found in this case, with interest.

WE WILL remove from our files any references to unlawful discharges and unlawful disciplinary actions and notify the employees who received such discharges and disciplinary actions that this has been done and that the discharges and disciplinary actions will not be used against them in any way.

WE WILL notify the labor contractor who supplied the services of the four temporary employees who were removed from the plant as a result of the unfair labor practices found herein that we have no objection to their referral for work at the plant.

VEMCO, INC.